Multi-Purpose Bank Bhd v Maimoon bte Abdul Razak

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO S5-24-867 OF 1997
JAMES FOONG J
26 MAY 1999

Land Law *— Sale of land — Order for — Cause to the contrary — Unilateral variation of method of computing interest — Difference between rates of interest and factor relied on to calculate rates — Whether amount to cause to the contrary*

The defendant created two third-party charges over her property in favour of the plaintiff — a bank. Upon default, the plaintiff took out a foreclosure action against the defendant. Counsel for the defendant resisted the application based on the following arguments: (i) the plaintiff has not forwarded to the defendant a letter of demand which should precede the service of Form 16D of National Land Code 1965 ('the NLC'); (ii) the plaintiff had misrepresented to the defendant to execute the second charge; (iii) since the plaintiff had without consent from the defendant adopted a new method of computing interest (from '1.75% above the prevailing base lending rate' to the calculation of interest based on 'monthly rest'), the outstanding sum due under the charge and consequently stated in Form 16D have been incorrectly stated; thus, the statutory notice becomes ineffective and invalid.

Held, dismissing the application with costs:

(1) There is no provision in the NLC which insists on a prior written notice of demand separate from that of Form 16D before the issuance of the statutory notice. In this case, Form 16D was used and was duly served on the defendant thereby amply satisfying the requirement under s 254(1) of the NLC (see p 217F–G).

(2) The allegation of misrepresentation is concocted and is merely an attempt to frustrate the plaintiff's contractual rights to enforce its security (see p 218A).

(3) There is a great difference between the rates of interest and the factor relied on to calculate such rates. Clause 5(a) of the annexure only allows the plaintiff to arbitrarily vary 'the rate of interest' and not the factor of computing such rate. Since the plaintiff has proceeded to base its calculation of interest on a factor that is not permitted by mutual consent of the parties and claiming such amount as due and owing in the statutory notice (Form 16D of the NLC), then it is a cause to the contrary in refusing the application (see p 218G–219B).

[Bahasa Malaysia summary

Defendan telah mewujudkan dua gadaian pihak ketiga di atas tanahnya kepada plaintif — sebuah bank. Ole kerana keingkaran, plaintif mengambil tindakan penutupan terhadap defendan. Peguam untuk defendan telah menentang permohonan tersebut berdasarkan hujahan-hujahan yang berikut: (i) plaintif tidak mengemukakan kepada defendan suatu surat tuntutan yang sepatutnya mendahului penyerahan Borang 16D Kanun Tanah Negara 1965 ('KTN'); (ii) plaintif telah salah nyata kepada defendan untuk melaksanakan gadaian kedua; (iii) oleh kerana plaintif tanpa kebenaran defendan telah memakai suatu cara baru untuk mengira faedah (dari '1.75% di atas kadar asas pinjaman yang sedia ada' untuk pengiraan faedah berdasarkan 'asas bulanan'), baki yang kena dibayar di bawah gadaian dan kemudian dinyatakan di dalam Borang 16D tidak dinyatakan dengan betul; oleh itu, notis berkanun adalah tidak efektif dan tidak sah.

Diputuskan, mengketepikan permohonan dengan kos:

(1) Tiada peruntukan di dalam KTN yang menegaskan notis tuntutan bertulis terdahulu yang berbeza dengan Borang 16D sebelum pengeluaran notis berkanun. Di dalam kes ini, Borang 16D telah digunakan dan telah diserahkan kepada defendan dan dengan itu memuaskan keperluan s 254(1) KTN (lihat ms 217F–G).

(2) Pengataan salah nyata adalah direka dan hanya cubaan untuk menggagalkan hak kontrak plaintif untuk menguatkuasakan jaminan (lihat ms 218A).

(3) Terdapat perbezaan yang besar antara kadar-kadar faedah dan juga faktor yang bergantung untuk mengira kadar-kadar tersebut. Fasal 5(a) lampiran tersebut hanya membenarkan plaintif untuk mengubah secara arbitrari 'kadar-kadar faedah' dan bukan faktor untuk mengira kadar tersebut. Oleh kerana plaintif telah bermula mendasarkan pengiraan faedah di atas faktor yang tidak dibenarkan oleh kebenaran berbalas pihak-pihak dan menuntut jumlah tersebut sebagai kena dibayar dan terhutang di dalam notis akuan (Borang 16D KTN), kemudian ia adalah sebab di sebaliknya di dalam menolak permohonan tersebut (lihat ms 218G–219B).]

Notes

For cases on order for sale of land generally, see 8 *Mallal's Digest* (4th Ed, 1999 Reissue) paras 3030–3101.

Cases referred to

Co-operative Central Bank Ltd v Meng Kuang Properties Bhd [1991] 2 MLJ 283 (refd)

Low Lee Lian v Ban Hin Lee Bank Bhd [1997] 1 MLJ 77 (refd)

Legislation referred to

National Land Code 1965 s 254(1)

KT Ho (*Wong & Cheng Kiat*) for the plaintiff.
Haris Ibrahim (*Haris & Co*) for the defendant.

James Foong J: This is a foreclosure action by the plaintiff, a bank, against the defendant, the owner of a piece of property held under HS (D) 70915 for PT 3517, Mukim and District of Kuala Lumpur, State of Wilayah Persekutuan ('the property'). It is on two third-party charges created by the defendant in favour of the plaintiff over the property for facilities granted to a third party, the defendant's husband.

Encik Haris, counsel for the defendant, advanced three grounds in his attempt to defeat this plaintiff's application. I shall deal with each of them in turn.

No letter of demand

The first point raised is that the plaintiff has not forwarded to the defendant a letter of demand which, according to En Haris, should precede the service of Form 16D of National Land Code ('the NLC') on the defendant. To support this, he cited a passage from the Federal Court judgment of Gopal Sri Ram JCA in *Low Lee Lian v Ban Hin Lee Bank Bhd* [1997] 1 MLJ 77 where at page 83 it states:

> ... failure on the part of the chargee to prove *the making of a demand* or service upon the chargee of a notice in Form 16D would constitute a cause to the contrary.' (Emphasis added.)

I see no merits in this contention. There is no provision in the NLC which insists on a prior written notice of demand separate from that of Form 16D before the issuance of this statutory notice. And even reading the above phrase of the Federal Court, I cannot find any indication of such a prerequisite. The conjunctive word 'or' is used between 'the making of a demand' and 'service upon the charger of a notice in Form 16D.' Thus, when the latter is carried out, it is sufficient by law to fulfill the making of a demand on the chargor before commencement of foreclosure action. In this case, Form 16D was used and was duly served on the defendant thereby amply satisfying the requirement under s 254(1) NLC.

Misrepresentation

The second matter raised is an allegation by the defendant that she was misrepresented by the plaintiff to execute the second charge. She pointed out that though the annexure in the second charge declares that it was created in consideration of an overdraft facility of RM170,000 to be granted to her husband, in reality it was to provide additional security for other unsecured loans granted by the defendant to her husband which were already utilized by him and where he had defaulted in repaying.

The plaintiff denied this accusation and explained that though they had extended temporary overdraft facilities to the husband, these were secured

by distinctive fixed deposit receipts and, at a time, these facilities were given pending the approval of a higher amount of overdraft facilities. A

I accept this explanation of the plaintiff after perusing the supporting documents annexed to its affidavit. This allegation of the defendant, in my view, is concocted; it is merely an attempt to frustrate the plaintiff's contractual rights to enforce its security. B

Computation of interest

The third issue centres on the word 'per annum' in cl 1(B)(i)(a) of the annexure of the first charge. Here, for the term loan of RM160,000, interest payable is 1.75% 'above the prevailing base lending rate (concurrently at six point five per centum (6.55%) per annum'. But the plaintiff had, subsequent to this agreement, varied this calculation of interest to be based on: 'monthly rest.' To this, En Haris protested: that the plaintiff cannot, except by consent from the defendant, alter such method of computation, and such permission was never obtained from the defendant; by adopting this new computation, the outstanding sum due under the charge is incorrect thereby also affecting the correctnesses of the sum due stated in the Form 16D served on the defendant; consequently, this statutory notice becomes ineffective and invalid rendering no support to this plaintiff's application. C D

Mr Ho, counsel for the plaintiff, hastily retorted by pointing out two provisions in the annexure where the plaintiff can, without prior notice to the defendant, vary such interest from time to time. The first is in cl 1(B)(i)(a) which continues with: 'where and when applicable such other rate as may from time to time and at any time be varied and substituted therefore in the manner hereinafter provided'. Then in cl 5(a), it provides: E

> Notwithstanding the provisions relating to the rate of interest as hereinbefore provided, the chargee shall be entitled at any time or from time to time vary at its sole and absolute discretion the prescribed rates without notice to the chargor(s) ... . F

This, argued Mr Ho, allows the plaintiff to alter the interest rate by agreement with the defendant. G

Encik Haris then immediately contested that these clauses only allows the plaintiff to vary the rates of interests but not the computation.

I am of the view that there is great force in En Haris's argument. There is a great difference between the rates of interest and the factor relied on to calculate such rates. A change of either one of these can substantially alter any calculation. Though cl 5(a) of the annexure allows the plaintiff to arbitrarily vary the interest, it is certainly restricted only to 'the rate of interest' as the clause declares. There is no reference made herein to allow the variation of the factor of computing such rate. Though I noticed that cl 1(B)(i)(a) of the annexure carries the words 'be varied and substituted' which may imply a wider meaning to include the factor of calculating the rate of interest, this is dependent on 'the manner hereinafter provided' as the sentence continues. And what is the manner hereinafter provided? To H I

my reading of the annexure, it must be associated with cl 5(a). And as I have explained above, this provision (cl 5(a)) is only of limited application. Since the plaintiff has proceeded to base its calculation of interest on a factor that is not permitted by mutual consent of the parties and claiming such amount as due and owing in the statutory notice (Form 16D of the NLC), then it is a cause to the contrary in refusing this application. This view is supported by the Federal Court judgment in *Low Lee Lian v Ban Hin Lee Bank Bhd* affirming the decision of Lim Beng Choon J in *Co-operative Central Bank Ltd v Meng Kuang Properties Bhd* [1991] 2 MLJ 283 where the bank failed to succeed in a foreclosure action against the chargor when default interest which the bank was not entitled to was included in the outstanding sum claimed under Form 16D of the NLC. I would further wish to add that it is immaterial whether the chargor would benefit by this substituted factor of calculating rate of interest (as in this case, the defendant will be paying a lower interest). What is more important is that no change can be permitted unless agreed upon. To compromise this may have an adverse effect when the calculation of outstanding sum may on the contrary, in certain situation, be a disadvantage to the chargor.

Conclusion

Accordingly, I hereby dismiss this plaintiff's application for foreclosure in encl 1 with costs.

Plaintiff's application dismissed with costs.

Reported by Loo Lai Mee